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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

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BETHANY SCAER AND STEPHEN SCAER *
*
v. * 24-cv-277-LM-TSM
* November 5, 2024
* 10:39 a.m.
*
CITY OF NASHUA, NEW HAMPSHIRE, ET *
AL *
*
* *

TRANSCRIPT OF PRELIMINARY INJUNCTION HEARING
BEFORE THE HONORABLE TALESHA SAINT-MARC

APPEARANCES:

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1 P R O C E E D I N G S
2

3 THE CLERK: This Court is now in session and has
4 before it a hearing on a motion for preliminary injunction in
5 the matter of Scaer, et al. versus City of Nashua, et al.,
6 24-cv-277-LM.

7 Would counsel please identify themselves for the
8 record, starting with counsel for the plaintiff.

9 MR. RISTUCCIA: Nathan Ristuccia, your Honor.

10 These are my clients, Bethany and Stephen Scaer.

11 THE COURT: Good morning.

12 MR. KOLDE: Del Kolde for the plaintiff also.

13 Mr. Ristuccia will be arguing today.

14 THE COURT: All right. Thank you.

15 MR. MCCANDLESS: And Roy McCandless, local counsel.

16 THE COURT: All right.

17 MR. BARNES: Good morning.

18 Jonathan Barnes, assistant corporation counsel for
the City of Nashua.

19 With me is Steve Bolton. He's corporation counsel.

20 THE COURT: Good morning.

21 MR. BOLTON: Good morning.

22 MR. PIGNATELLI: Good morning, your Honor.

23 Adam Pignatelli for Mayor Donchess.

24 And with me is my colleague, Piper Fenoff.

25 THE COURT: Good morning.

1 MR. CALLAGHAN: And Peter Callaghan for Jennifer
2 Deshaies.

3 And Kat Mail is with me as well for Ms. Deshaies.

4 THE COURT: All right. Good morning, everybody.

5 I'll turn that on so you can hear me a little bit
6 better.

7 All right. So we're here on the preliminary
8 injunction motion.

9 I'll start off by hearing from the plaintiffs, and I
10 would like to start out with the mootness argument before you
11 get into any argument on the merits.

12 And because we have a court reporter, I'll just
13 remind everybody to just speak slowly.

14 And, Susan, remind me if I start speaking too fast
15 to do the same, please.

16 All right.

17 MR. RISTUCCIA: Thank you, your Honor.

18 Your Honor, this case is in no way moot. I would
19 like to remind the Court, your Honor, that mootness is a burden
20 on the defendant's side. They must prove what the Supreme
21 Court has called a formidable burden of showing that it's
22 absolutely clear that the alleged wrongful behavior could not
23 reasonably be expected to occur, and they have by no means met
24 this burden.

25 Indeed, defendants themselves in their opposition

1 admit implicitly that this case is not moot. They claim that
2 two of the three of the injunctions that we've asked for before
3 this Court are moot, but they give various merit-based reasons
4 why this Court should reject the third one which they admit
5 would operate against their current 2024 Flag Policy just as it
6 would against their past previous repealed 2022 Flag Policy.

7 That is a concession that this case is not moot. If
8 this Court can grant some relief that would operate against the
9 defendants, then it is in fact not moot.

10 THE COURT: Would that leave just one piece of the
11 case that's not moot?

12 MR. RISTUCCIA: It is the plaintiffs' position, as I
13 will go on, your Honor, to explain, that in fact there's
14 significantly more that is not moot, both another one of the
15 two requested injunctions, as well as of course our request for
16 declaratory relief and nominal damages, all of which are not --

17 THE COURT: So with regard to the preliminary
18 injunction, one of the requests that the plaintiffs are asking
19 for is that the Court enjoin the 2022 policy. So how is that
20 not moot?

21 MR. RISTUCCIA: So that is the second of the three.

22 We agree that the 2022 Flag Policy has been repealed
23 and that in that sense is moot.

24 Even on that request, your Honor, this Court does
25 still have the authority to enjoin a reversion to the 2022 Flag

1 Policy or to enjoin the shutting down of the forum itself.

2 Various courts have found that if a forum is shut
3 down for viewpoint discriminatory reasons, that shutting down
4 of a public forum itself can be enjoined, and that would
5 certainly be within this Court's possibility and within this
6 Court's power.

7 However, the first of our three as well as -- the
8 third is the one that they themselves confess is not moot.

9 The first of our requested injunctive relief
10 requested this Court enjoin any viewpoint discrimination
11 against flag applications of any sort regardless of whether
12 that viewpoint discrimination occurs through the 2022 policy or
13 through some other policy.

14 And it is clear that flag requests are still fully
15 possible, indeed are encouraged on their own current website,
16 as I'll show your Honor in a moment, and, thus, flag requests
17 are still -- theoretically can still be made. My clients have
18 declared they will still make them, and they would still be
19 discriminated against under the current policy on the basis of
20 viewpoint.

21 Your Honor, if I can show an exhibit or two? Your
22 Honor, these are ones that have already been filed.

23 Looking at Exhibit M here, this is the current
24 website, Nashua's current website. This is after their repeal
25 of the 2022 policy.

1 And going down, your Honor, they have at the top of
2 it, first, a City Hall Plaza Events Policy, using almost
3 exactly the same words as the former 2022 Flag Policy, stating
4 that they will prevent any applications for a ceremony on the
5 plaza which, "expresses a message that is not in harmony with
6 city policies and messages the city wishes to express or
7 endorse."

8 They also state that they will not allow any
9 ceremonies on the plaza if those are contrary to the city's --

10 THE COURT: But how does that relate to the flag
11 policy? Because that's the policy you're challenging, right?

12 MR. RISTUCCIA: Yes, your Honor. I will give a
13 moment, your Honor, on that.

14 They also specifically state on the flag policy that
15 in order to submit for approval you should follow the
16 guidelines and procedures provided below.

17 Going below, your Honor, to those specific
18 guidelines and procedures, they then give three links. One
19 link is to their current flag policy, the one that was passed
20 October the 7th, and the other is the 2022 Special Events
21 Application and the 2022 Special Events Procedures. These are
22 the exact same special events applications, your Honor, and
23 special events procedures that my client applied using on all
24 three of the applications, the flag applications still at
25 issue, and all three documents -- two documents still

1 specifically discuss flag requests.

2 THE COURT: Slow down a little bit.

3 MR. RISTUCCIA: I'm sorry, your Honor.

4 THE COURT: That's okay.

5 MR. RISTUCCIA: Both of these documents that are
6 still on their website, and in fact are being encouraged to be
7 used, explicitly discuss flag requests. So the flag requests
8 are encouraged on their own website.

9 The other two I would like to show, your Honor, are
10 those other two. Here is the current special events procedure.
11 Again, the one that is linked to on the website. It's filed as
12 Exhibit E.

13 And going down, your Honor, you will see that they
14 have still a lengthy discussion of how to make requests for the
15 use of the city flagpole on this very procedure that they are
16 -- on their website, and they are encouraging and in fact
17 telling people to use.

18 And the last is the specific form. This is just one
19 example. Many versions of this form have been filed. This is
20 the particular one that my client, Mr. Scaer, used when
21 applying for his Detransition Awareness flag.

22 And again, if you notice, it's a little hard to see,
23 it specifically addresses flag requests as well as ceremonies.
24 So if you want to have a ceremony, you're supposed to apply
25 using this. If you want to have a flag flown as part of that

1 ceremony, you should apply using this. Far from indicating
2 that they will no longer accept any flag applications.
3 Therefore, they are encouraging on their website the continuing
4 requests of city -- to use the city flagpole.

5 Those requests admittedly will no longer be judged
6 using the 2022 Flag Policy, but we have not only challenged the
7 2022 Flag Policy. We've been challenging viewpoint
8 discrimination in general. And whether or not they
9 discriminated against my client's flag applications on the 2022
10 Flag Policy versus on the 2024 Flag Policy or the 2024 City
11 Plaza Events Policy makes no difference to the requested relief
12 we asked. It is the viewpoint discrimination that we are
13 asking this Court enjoin, not the specific policy.

14 THE COURT: Because when I look at your prayers for
15 relief in your complaint, it says you are looking for a
16 preliminary permanent injunction related to denying flag
17 applications and preventing flags from being flown on the
18 citizen flagpole, enforcing the Nashua flagpole policy, and
19 denying removing any flag because of a citizen complaint.

20 MR. RISTUCCIA: Correct, your Honor.

21 THE COURT: That's all focused on the flag policy.

22 MR. RISTUCCIA: If you look, your Honor, at our
23 proposed order, they have been divided out into three separate
24 requests for injunctive relief.

25 Perhaps I wrote -- that was written perhaps poorly

1 at the end of the plaintiffs' motion, but it's quite clear on
2 the proposed order we're asking for three separate preliminary
3 injunctions.

4 One for denying flag applications, any flags from
5 being flown on the citizen flag policy on the basis of
6 viewpoint, one asking for an injunction of the city's 2022
7 flagpole policy, and the third about denying or removing any
8 flag because a citizen complains or it has been deemed
9 offensive by city officials. So three separate injunctions.

10 As the defendants themselves concede in their
11 opposition, they state that two of these they claim are moot,
12 but they admit the third is in fact not moot but would still
13 operate even on their 2024 flagpole policy.

14 Plaintiff is simply saying that number one would
15 also fully operate on their current policies. It is only the
16 second of the two that would be moot because of the repeal of
17 that policy.

18 THE COURT: Okay.

19 MR. RISTUCCIA: We also question to what extent this
20 repeal has occurred. There's no question that the 2022 policy
21 has been taken down, and as they've stated, it has been
22 repealed, but there's been some mixed messages from defendants
23 themselves. Defendant's own counsel stated to a reporter that
24 this was only a clarification and not an outright change. So
25 it is unclear to me exactly how those two are both true.

1 Admittedly, it's possible that there was some sort of --

2 THE COURT: Well, hasn't their position been from
3 the outset, though, that this is government speech, and so
4 wouldn't that be consistent with that position?

5 MR. RISTUCCIA: It still would mean that -- there's
6 always been government speech, and that would certainly be
7 consistent. What was being said to the reporter seemed to be
8 that this was not a new policy but a clarification of the old
9 policy. And if this is just a rewriting that clarifies
10 language, that would imply that even the '22 Flag Policy is
11 still really just the 2024 Flag Policy clarified and that even
12 our second form of relief then would operate.

13 There also has been no legislative appeal of any
14 kind of this flag policy. There's simply, as they admit in
15 their opposition, an action that was taken by Mayor Donchess
16 himself under his own authority. He is the only one who signed
17 the new policy. He has chosen to revoke the '22 Flag Policy.

18 But the aldermen have not voted in any way to make
19 this change. One of the aldermen has in fact recently called
20 for a legislative appeal because he's concerned about this
21 issue that there's not been an official legislative appeal.

22 And because there has been no legislative appeal,
23 Mayor Donchess can restore the 2022 Flag Policy just as quickly
24 and simply as he revoked the 2022 Flag Policy.

25 We would ask then for an injunction preventing such

1 a reversion to the 2022 policy of one that we sued to enjoin,
2 without which -- it would be too easy for the government to
3 simply manipulate this just briefly -- by mooting something
4 briefly in order to avoid judicial review and with every
5 intention to return to a prior policy once this Court has made
6 its decision.

7 As a result, we don't feel -- the plaintiff claims
8 that this is not close in any way to meeting the burden. This
9 is a formidable burden that has not been met when their own
10 website is clearly stating that people can continue to apply.
11 Regardless of whether those applications would be denied or
12 accepted, that the applications are fully possible and can be
13 discriminated against based on viewpoint, which is what we're
14 asking for an injunction against.

15 THE COURT: All right. Thank you.

16 Let me hear from the defendants on mootness.

17 Then I'll come back to you on your merits argument.

18 MR. RISTUCCIA: Thank you, your Honor.

19 THE COURT: Thank you.

20 MR. BARNES: Thank you, your Honor.

21 It's the city's position that when the 2024 policy
22 repealed all prior policies, that this matter was mooted.

23 They're looking for an injunction. We're here
24 because they want to impose the plaintiffs' will on the city, a
25 lot of what the injunctive relief that they're seeking, and our

1 position is tantamount to compelled speech, which is --
2 everything says -- the allegations contained in their
3 complaint.

4 There is no danger -- given the current policy that
5 has repealed the prior policy, there's no danger that the city
6 is going to go back on -- if this matter were to be dismissed,
7 that it's not in the city's interest to do so.

8 They've presented no evidence that the city has
9 plans to go back to a prior policy. This isn't a situation
10 where they've announced a moratorium on raising flags. It's a
11 permanent repeal.

12 The Mayor's Office has always been in control of the
13 policies concerning the flag. There's no aldermatic action
14 despite what some single alderman might want to do. I don't
15 think that this is a compelling reason to find that this is not
16 moot.

17 THE COURT: But is it sufficient for the mayor who
18 has discretionary authority to change the policy, as he's done
19 a couple of times in this case, just to say I've changed it now
20 to the 2024 policy?

21 There's no evidence here before me in the record
22 that he's not going to change it again. So is that sufficient
23 for me based on this record to say that voluntary succession is
24 satisfied and this case is moot?

25 MR. BARNES: I think there is. Because the whole

1 purpose of enacting the 2022 policy -- I could even go back.
2 The whole purpose of the policy that preceded the 2022 policy
3 was to comport with the law that the First Circuit handed down
4 in Shurtleff. And then when that was overturned by the Supreme
5 Court, the city changed their policy again.

6 And the whole purpose of this evolving policy is to
7 make it abundantly clear to everybody that it's government
8 speech. And, unfortunately, that wasn't clear to the
9 plaintiffs and we're here today.

10 And so the policy was repealed because it's not in
11 the city's best interests to have these disruptions. The city
12 has multiple types of things that they need to handle on any
13 given day, and they don't need to be burdened by things like
14 this.

15 There have been other cases where they have found
16 noncommercial disruptive speech in advertising on the side of a
17 metro train car to be -- it's perfectly reasonable for the
18 government to keep that out, and that's what the city is
19 attempting to do here by exercising its government speech.

20 THE COURT: So if the Court agrees with you that
21 there's some elements that may be mooted by the 2024 policy
22 change, what remains in the case if anything?

23 MR. BARNES: I don't think anything remains.
24 Potentially, the nominal damages, but then that raises the
25 question of whether this Court has jurisdiction because --

1 there's a three-part test that requires that there be federal
2 law, that the government officials are acting in their official
3 capacity, and that they're looking for prospective relief, and
4 if there's no prospective relief, you're just looking at past
5 conduct. I don't think the Court has jurisdiction to hear
6 that. I think we're at state court at that point.

7 THE COURT: Okay. All right.

8 Anything else on the mootness argument?

9 MR. BARNES: There is one thing. It's sort of
10 tangentially related to something my brother said.

11 There's a matter of Rhames versus City of Biddeford,
12 and in that case there was a public access channel that the
13 government allowed its citizens to use and there was some
14 controversy involving some of the citizens, and they put a
15 moratorium on the access to the cable channel until they could
16 craft some sort of guidelines onto what type of programming was
17 allowed, and the District of Maine found that that was
18 permissible. Their reasoning for doing so is they said that --
19 despite the -- I'm sorry. They said that: Because Biddeford
20 has no obligation to operate a public access channel, the Court
21 finds that the plaintiff has not shown a likelihood of success
22 on the merits of his claim.

23 I think that case is applicable here. They haven't
24 demonstrated that the plaintiffs or any citizen is entitled or
25 that the city is obligated to provide them with a flag-raising

1 program. So I don't think that they can succeed on the merits
2 based on that.

3 THE COURT: So as it relates to mootness, one other
4 question.

5 Going back to the exhibits that counsel showed
6 regarding the City Hall Plaza policy, why does the fact that
7 that policy is still in place and it still has language similar
8 to the 2022 policy not act as a kind of stop to the mootness
9 argument?

10 MR. BARNES: Understood.

11 Well, your Honor kind of touched on it earlier.
12 They're talking about a city hall ceremony out front. It has
13 nothing to do with flags.

14 THE COURT: Right. But isn't that evidence, though,
15 that the city could still go back to the 2022 policy and that
16 the mayor is just making this discretionary change now to stop
17 a lawsuit?

18 MR. BARNES: I don't think so, your Honor, and the
19 reason being is that, as the Shurtleff Court noted, when a flag
20 is raised in front of -- as the speech of government is
21 generally thought of as government speech, but a citizen
22 standing in front of city hall waving a flag and speaking
23 whatever they want into a megaphone is probably going to be
24 attributed to the citizen and not the government. So there's
25 less of a concern that the government is going to be embroiled

1 in any kind of controversy or that it's going to be disruptive
2 to their day-to-day business because somebody got out front and
3 started saying, you know, whatever they felt they needed to
4 say.

5 THE COURT: All right. Thank you.

6 Anything else on mootness?

7 MR. BARNES: No, ma'am.

8 THE COURT: All right.

9 Attorney Ristuccia, anything else on the mootness
10 argument before you move on to the merits?

11 MR. RISTUCCIA: May I just respond briefly to the
12 question of qualified immunity, your Honor, since that was
13 brought up?

14 I just wanted to point out, your Honor, first of
15 all, there are no state claims in this case so there would be
16 nothing to send back to state court, you know, if all the
17 claims, the federal claims are dismissed.

18 Moreover, qualified immunity has not in any way been
19 decided, it has not been in any way briefed, and it would not
20 cover the city of Nashua itself, which is not in fact -- we've
21 asked for claims against the city of Nashua as well as against
22 all the individual defendants. Qualified immunity at most
23 covers all of the individual defendants not of the city of
24 Nashua. So even if qualified immunity were granted, there
25 would still in fact be a nominal damages claim against the city

1 of Nashua that would prevent this court case from being mooted.

2 THE COURT: Okay. All right.

3 Let's move into the merits of the argument.

4 I'm going to reserve my decision on the mootness
5 decision.

6 MR. RISTUCCIA: Thank you, your Honor.

7 Nashua has said today that this flagpole is
8 government speech. That's not surprising. They've been saying
9 this flagpole and the flags on it are government speech at
10 least since 2020 despite the fact that they've changed their
11 policy by my count four times in the course of that process.
12 Every time they change the policy they insist that it was
13 government speech and that it was government speech even under
14 the old policy. They continue to say that the old policy, the
15 2022 policy, was constitutional and that it was government
16 speech under that policy, too.

17 Rather, the goal of keeping the change of this
18 policy is that whenever they realize there's some sort of legal
19 problem and that their past policy does not in fact cohere with
20 Shurtleff or does not in fact cohere with how Shurtleff has
21 been applied by the lower courts, then they make a change but
22 say, well, the change is just a clarification, we actually will
23 always just government speech because the history and public
24 perception of a --

25 THE COURT: But aren't they entitled to make changes

1 that comply with the law?

2 MR. RISTUCCIA: Absolutely.

3 THE COURT: If their policy is now out of
4 compliance, isn't it their obligation to update that policy to
5 make it in compliance?

6 MR. RISTUCCIA: It is absolutely allowed for any
7 government to change the policies that affect, in particular, a
8 limited public forum, and plaintiff is not by any means
9 suggesting otherwise.

10 However, when judging government speech, the Supreme
11 Court has made clear that history and public perception, two of
12 the three factors of the government speech test, look quite
13 broadly at history and public perception in general and
14 includes past events as well as present policies.

15 The defendant cannot argue at least under specific
16 Supreme Court precedent that this Court should only look at,
17 for example, the history of the 2024 policy that currently is
18 standing or for that matter the history of only the 2022
19 policy.

20 The Supreme Court in Shurtleff went back all the way
21 to the Middle Ages when it was trying to discuss the history
22 prong of its analysis. And courts have made a clear
23 distinction between the general history of a particular type of
24 expression and the specific history of the particular policy at
25 issue.

1 I point the Court, for example, to the Cajune case,
2 which is 105 F.4th 1170 from the Eighth Circuit, which
3 discusses the difference between general history and specific
4 history quite well, though this is also discussed in Shurtleff
5 itself at 254.

6 I would also point this Court to the McCreary County
7 case. The McCreary County case was an establishment clause
8 case, not a First Amendment free speech case, but it was a case
9 about government speech. It was specifically a case where
10 there was a government display and one of the parties argued
11 this display was a limited public forum and the other party
12 argued the display was government speech. And the government
13 there argued, just as defendants are arguing, that only the
14 last policy should be looked at. The one that's currently
15 under operation. In that case that would be the 2024 policy,
16 but the Court rejected this argument and found that all three
17 of the policies that had been instituted in a series in that
18 case should be looked at when evaluating whether or not the
19 particular forum was government speech or a limited public
20 forum.

21 To quote from the McCreary case, which, by the way,
22 is 545 U.S. 844, to quote from it -- 866, "The world is not
23 made brand new every morning." "Reasonable observers have
24 reasonable memories, and our precedents sensibly forbid an
25 observer to turn a blind eye to the context in which the policy

1 arose."

2 In this case the context was a flag policy that went
3 back all the way to 2017, in which a wide variety of flags were
4 flown. Many of which are not sensibly -- could not sensibly be
5 construed as government speech and in fact would be
6 inappropriate for a government to state, such as religious
7 flags like the Lutheran Rose flag or the Christian flag that
8 were flown only six months ago. But that these flags were
9 flown, were perceived by the public as having been flown, would
10 have naturally be understood to be the speech of the particular
11 applicant, not of the government itself.

12 The government does not play any active role in
13 shaping the flags that fly on the flagpole. The flags are
14 provided by the applicants. They are designed by the
15 applicants or at least they are often raised by the applicants.
16 Government officials often do not attend the flag-raising
17 ceremony. They don't organize those ceremonies. They don't
18 necessarily speak at those ceremonies. After a flag is flown,
19 applicants are free to come and collect their flag and take it
20 home. It remains their property.

21 To quote the Shurtleff decision and a section that
22 was cited by the defendants themselves, this is at 270 -- it's
23 actually from the Alito concurring opinion, but it was cited by
24 the defendants as the standard. "For the adopted expression to
25 qualify as the government's, the private party must alienate

1 control over the medium of expression to the government."

2 "Otherwise, the government is simply providing a forum."

3 There's been no alienation of control over these
4 flags when the flags are the property of the applicant who
5 provides them, who flies them, who takes them home at the end.
6 The only thing that is in the government's control is whether
7 or not those flags get approved or denied.

8 In this case all three factors in the government's
9 speech test clearly point that this is an individual speech on
10 a limited public forum or perhaps a nonpublic forum.

11 Plaintiffs would argue this is a limited public forum. It fits
12 the class and criteria of being a forum that's been opened up
13 for a particular range of speakers or a particular range of
14 expression. In this case, expression that celebrates a
15 particular anniversary or a particular heritage or a special
16 accomplishment or that pushes for some cause. That is a
17 standard language for a limited public forum.

18 But even if it's a nonpublic forum, the standard
19 that this Court would apply would be same. In fact, nonpublic
20 forums and limited public forums, as the First Circuit has
21 recognized, are essentially equivalent.

22 And the defendants themselves acknowledge at one
23 point that this is -- they concede that it is a nonpublic
24 forum. They state this on page 10 of their most recent
25 opposition which, if I could quote from, your Honor, states

1 quite clearly this is a nonpublic forum. Quoting from page 10
2 of the defendant's opposition: "The city's 2022 Flag Policy
3 specifically states that this potential use of this city's flag
4 pole is not intended to serve as a forum for the expression by
5 the public (emphasis added). As such, under that policy the
6 city's flagpoles were a nonpublic forum and continue to be so
7 under the 2024 City Hall Flagpole Policy."

8 Right there a concession this is a nonpublic forum,
9 and, as such, speech on it must -- any regulation of speech on
10 it must be both viewpoint neutral and reasonable in light of
11 the purpose of the particular forum.

12 In this case neither of those requirements were met.
13 It is certainly not viewpoint neutral. The 2022 policy quite
14 explicitly allows, in fact encourages, discrimination on
15 viewpoint. Its messages are exactly what they object to. Any
16 message that the city does not wish to endorse or express can
17 be prevented from being flown, as well as any message that is
18 contrary to the city's best interest or that supports a -- that
19 does not support a "worthy cause."

20 Worthiness -- whether something is in the city's
21 best interest or whether something is a message that the cities
22 wish to endorse or express are straightforward cases of
23 viewpoint discriminatory regulation.

24 It is also unreasonable for the city to insist that
25 particular anniversaries are acceptable and other particular

1 anniversaries are not when their own flag policy simply says
2 anniversaries and causes.

3 My clients applied on the three flags at issue here.

4 All three of them were in honor of particular anniversaries.

5 The Save Women's Sports flag, for example, was in
6 honor of the 50th anniversary of Title IX. That is an
7 anniversary and a wish to be commemorated by my clients, and it
8 is unreasonable for them to insist that that type of
9 anniversary is not acceptable when it fully fits within the
10 criteria that their own flag policy lays out.

11 Public perception also clearly points to the fact
12 that this is not government speech but rather the speech of the
13 particular applicant.

14 Even the name Citizen Flagpole, which was widely
15 used, was on the website of the city for many years and is
16 still widely used today, including by government officials,
17 shows that this is a flagpole for citizens. And though this
18 phrase admittedly is no longer on their website, I'm not sure
19 when it was removed, it is still used by government officials.
20 It was used by defendant Deshaies in an e-mail in December --

21 THE COURT: Counsel, I'm just going to ask you to
22 slow down for the court reporter. Thank you.

23 MR. RISTUCCIA: This name Citizen Flagpole was used
24 by defendant Deshaies herself in December of 2023.

25 It was used by Kathleen Palmer, as the record shows,

1 who is the mayor's own events coordinator. In May 2023 when
2 Kathleen Palmer was applying on the mayor's behalf to use the
3 flagpole, she still referred to this flagpole as a citizen
4 flagpole.

5 It was used by an alderman just a week ago in a
6 newsletter sent to that alderman's constituencies discussing
7 the flagpole, and he repeatedly refers to it as the citizen
8 flagpole. It's used by -- many of the flag applicants
9 themselves refer to it as such in their applications as the
10 record clearly shows.

11 The record has not been called into question in any
12 way by defendants. They have not pushed against the record or
13 said that these are somehow inauthentic documents, but they
14 admitted that these are genuine documents and simply said, for
15 example, that defendant Deshaies misspoke when she -- or used
16 it by accident when she referred to the phrase Citizen Flag
17 Pole. This name is common, it was once official, and it is
18 still widely used. That goes to public perception and shows
19 that regular people who are hearing government officials call
20 it the citizen flagpole are going to think that citizens can
21 use this flagpole and that the flags on the pole are flown by
22 citizens. Particularly when they look and see ceremonies
23 raising those flags in which no government official appears and
24 which the citizen who applied to use the flag is raising that
25 flag and giving a speech and often quite -- and sometimes a

1 quite anti-Nashua speech at that ceremony.

2 Again, in the Shurtleff decision the Supreme Court
3 specifically acknowledged that the ceremonies used to raise
4 flags does in fact go into interpreting whether or not that
5 flagpole is government speech or a limited public forum under
6 the public perception factor of that test.

7 As such, the history, the public perception, and the
8 active shaping of this flagpole all show that this is not in
9 fact government speech but is citizen speech and citizen speech
10 that's being discriminated against on the basis of viewpoint.

11 Plaintiff has also argued and continues to argue
12 that the current policies being used by Nashua also violate the
13 doctrine of prior restraint, of vagueness, and of overbreadth,
14 and all three of those types of First Amendment tests apply to
15 limited public forum and to nonpublic forum alike. They're not
16 just for limited public forum.

17 Since Nashua itself has conceded at least this is a
18 nonpublic forum, and we have argued that this in fact a limited
19 public forum, those tests would still apply, and they cannot
20 justify the boundless discretion, the unbridled discretion
21 that's being given to government officials in deciding what
22 flags should fly on this pole or not.

23 THE COURT: Does the analysis change as it relates
24 to government speech versus limited public or nonpublic speech
25 if the city were to also have some kind of internal guidance as

1 to how the policy were to be implemented, meaning what is
2 harmonious with the city message, what is against the city
3 interests?

4 MR. RISTUCCIA: So if the flag is government speech,
5 your Honor, then none of these -- the First Amendment does not
6 apply to government speech as we recognize.

7 THE COURT: Right.

8 MR. RISTUCCIA: If it is a nonpublic forum versus a
9 limited public forum, such internal guidance might prevent
10 there from being unbridled discretion, but it would still be
11 vague if the -- since vagueness is judged based on the
12 reasonable citizen or the reasonable observer.

13 THE COURT: I guess my question is more so under
14 Shurtleff.

15 Would having some more guidance to go along with the
16 policy convert this policy to a government speech and not the
17 limited public forum that you're arguing?

18 MR. RISTUCCIA: I certainly think there are things
19 that Nashua could do to make this pole into government speech.

20 If they prevented any flags other than government
21 flags from flying on it, for example, your Honor. Every
22 limited forum and every nonpublic forum can be shut down by the
23 government if they take --

24 THE COURT: That wasn't really the requirement of
25 that case. The requirement was really, as I read it, that the

1 government has -- the city has some kind of policy and maybe
2 some other internal policies that would clarify or instruct as
3 to how the policy would be carried out.

4 MR. RISTUCCIA: Yes, your Honor.

5 The holding in that case was that if they had a
6 policy sufficient in order to meet all three factors, that it
7 would be government speech.

8 And the Court held up particularly the policy being
9 used by the city of San Jose as being an example of the kind of
10 policy that was sufficiently developed and showed a level of
11 control and shaping of the flagpole by the city sufficient to
12 qualify as government speech.

13 If you compare the San Jose policy, though, to the
14 2022 policy, it is remarkable how dissimilar the two are alike.
15 San Jose had a strict list of particular flags that could be
16 flown. It must be a flag from that list, not any other flag.
17 And they also limited who was allowed to apply. It actually
18 somewhat depended on the particular flag. If a particular
19 flag, for example the Flag of Foreign Nation, was to be flown,
20 and many such Foreign Nation flags have been flown at Nashua in
21 honor of Irish Independence Day, for example, or Indian
22 Independence Day, those flags could only be applied for by a
23 city official, and it had to be one of a list of countries,
24 countries that had been recognized as countries by the United
25 States government. Only those countries of those flags. So

1 not, for example, the flag of Kurdistan which was flown on the
2 Nashua flagpole. That was not a government-recognized country.
3 It would not have been allowed under the San Jose flagpole
4 policy.

5 So these two policies are quite different, and by no
6 means has the 2022 policy reached anything like the level of
7 control and shaping that the San Jose policy evidenced.

8 THE COURT: I'm sorry. I'm just looking for -- I
9 know that you all provided the San Jose policy in your
10 briefing, but I can't recall which briefing it was attached to.

11 MR. RISTUCCIA: So it was not attached as an
12 exhibit, your Honor, only the section, you know, the Supreme
13 Court discussion was attached. However, the link was attached
14 with --

15 THE COURT: Okay.

16 MR. RISTUCCIA: And the link is in our reply brief.
17 I don't remember the exact page, but I can find it for you if
18 you want, your Honor.

19 THE COURT: That's all right. Thank you. That's
20 enough direction for me. Thank you. I remember seeing it.

21 MR. RISTUCCIA: And that link was simply taken from
22 the particular amicus brief that San Jose filed.

23 So as a result, your Honor, the history prong also
24 clearly points to this being government speech, not -- sorry --
25 being citizen speech, not government speech, despite the fact

1 that the San Jose policy was approved. It's a very different
2 issue.

3 It is true that Nashua claims that they designed
4 their current -- well, not the current. The 2022 Flag Policy
5 was allegedly designed to mirror the San Jose policy, but it
6 does not mirror it closely at all, your Honor.

7 As a result, all three factors go towards the point
8 of this is government speech -- this is citizen speech, not
9 government speech.

10 Any other questions, your Honor?

11 THE COURT: No. I don't have any other questions on
12 that. Thank you.

13 All right. Counsel.

14 MR. BARNES: Thank you, your Honor.

15 THE COURT: I guess my first question for you is,
16 you know, the message -- I mean, it's clear to me that it seems
17 like what the city was trying to do was make this government
18 speech at least through the 2024 policy, maybe earlier. But
19 when I'm looking at the 2022 policy, does the message that the
20 city intends to convey have to be more specific than just in
21 harmony with the city policies and not against city interests?
22 I mean, that seems really broad, right, and discretionary.

23 MR. BARNES: I don't know that it's that broad
24 because there's four categories that it lays out ahead of time.
25 Cultural events, substantial achievement, worthy cause, and

1 anniversary.

2 I mean, my brother would have you believe that we
3 can raise the Nazi flag to commemorate Hitler's birthday. I
4 think that's totally unreasonable, and it certainly wouldn't be
5 in the city's best interests to do that.

6 THE COURT: Well, certainly, though, doesn't the
7 Pine Tree flag commemorate an anniversary?

8 MR. BARNES: It did once upon a time, your Honor.
9 Unfortunately, it's been misappropriated. There's been
10 numerous news articles that talk about how that has been
11 misappropriated by far-right groups as some sort of symbol of,
12 you know --

13 THE COURT: How is a citizen supposed to know that a
14 flag that's been subverted in meaning, even if it fits within
15 one of the categories under the policy, is no longer acceptable
16 until they get the denial notice? What guidance does the city
17 provide for that beforehand or even internal guidance? I mean,
18 I don't have any evidence that there's even internal guidance.

19 MR. BARNES: I think that when it's government
20 speech, I don't know that you need to have, as my brother
21 suggested, as much guidance as, say, the city of San Jose has
22 done. I think you just have to demonstrate that there's some
23 control there, and I think the policy achieves that end.

24 THE COURT: I guess my -- I guess I'm not really
25 sure that there's control here. That's what I'm getting at.

1 If there's no real internal policies that guide you as to how
2 you would implement this policy, how is there control? So
3 meaning, if your -- if Ms. Deshaies were to review the policy
4 and get an application that suggests an anniversary, how would
5 she know whether it's an anniversary that's appropriate to
6 celebrate or not?

7 MR. BARNES: I think that there's discussion with
8 the mayor who is -- the Mayor's Office has always been in
9 control of the flag policy, and is that a message that this
10 administration wants to convey? Is there a problem with it?

11 It's not just the Scaers' applications that have
12 been denied. I submitted some exhibits yesterday that shows
13 that an individual wanted to fly the Palestinian flag, and that
14 was denied because, again, it's not in the city's best
15 interests to wade into that controversy between Israel and
16 Palestine. It's just too disruptive to the ongoing day-to-day
17 business.

18 So what Shurtleff made clear was that -- you know,
19 you look at the history, and they recognize the history as the
20 seat of government, it's typically government speech, but it
21 was critical for the city of Boston because its flag policy --
22 well, there really wasn't one. There was no written policy
23 whatsoever. So that was their concern. They didn't say that
24 you needed to have a policy exactly like the city of San
25 Jose's. They used it as an illustrative example of saying this

1 is a city that has a policy.

2 So as long as there's some written policy to give a
3 person of reasonable intelligence an idea of what would and
4 would not be acceptable, then it's government speech.

5 THE COURT: Okay. Well, assuming it's not, what's
6 your -- you know, I've read your brief, obviously, so I know
7 you have other arguments as it relates to the constitutional
8 challenges of overbreadth and vagueness.

9 Is there anything else you want to highlight in that
10 regard?

11 MR. BARNES: Well, I mean, I don't think we get
12 there because I think it's government speech and there's the
13 mootness issue.

14 But with respect to viewpoint discrimination, the
15 city of Nashua doesn't believe that it's in its best interests
16 to raise flags that are blatantly controversial that can
17 disrupt city business.

18 And in American Freedom Defense Initiative versus
19 Washington Metro Area Transit Authority, the citation is
20 91 F.3d 356, that's out of the D.C. Circuit Court, it was
21 decided in 2018, they said that -- in that case the Court held
22 that limiting their advertising space to "less controversial
23 advertising did not rise to viewpoint discrimination," and
24 that's what the city has done here.

25 And with respect to prior restraint, New England

1 Regional Council of Carpenters, you know, in that case the
2 Supreme Court upheld a total ban on leafletting in a particular
3 nonpublic forum. That's what has happened here with the 2024
4 policy. And if you go by the 2022 policy, that's even more
5 narrow than an outright ban on flag raising.

6 And with vagueness, the issue of vagueness, the
7 whole point of trying to avoid vagueness is to run afoul of the
8 law unknowingly, but that would never happen here because they
9 would apply ahead of time and then the city would accept or
10 reject the flag ahead of time.

11 THE COURT: Right. But the fact that you have
12 applied without knowing the circumstances under which the city
13 would reject your application, doesn't that suggest the law is
14 vague? So if I don't know what Mayor Donchess would feel is
15 inappropriate for the city, doesn't that make the policy vague?

16 MR. BARNES: I don't think it makes it unreasonably
17 vague. There has to be some criteria, and the city has
18 established some criteria, and it certainly -- I know with the
19 2024 policy there is no vagueness argument whatsoever, but
20 under the 2022 policy you have the four categories that the
21 city is looking for and then best interests, and I think a
22 person exercising some common sense about who's in office and
23 the kind of messages that they get behind could come to the
24 conclusion about what is and isn't acceptable and what is and
25 isn't considered to be disruptive to --

1 THE COURT: But isn't that viewpoint discrimination
2 if you're trying to focus on who's in office and what's
3 acceptable? Wouldn't that be focusing on the viewpoint that's
4 acceptable to the person in office?

5 MR. BARNES: I don't think it's the viewpoint. I
6 think it's the subject matter that they want to steer away from
7 in order to not disrupt, you know, what's going to be
8 controversial here.

9 I mean, take the Palestinian flag, for example. If
10 someone applied to fly the Israel flag, I would say you would
11 probably reject that, too, because it's just -- you don't want
12 to wade into those waters. You want to be able to conduct your
13 city business without getting inundated with angry phones,
14 e-mails, and people threatening you on Twitter, or X, whatever
15 it's called now.

16 THE COURT: Well, certainly, though -- I mean, I
17 think at one point the city accepted the Pride flag. That's
18 still a controversial position.

19 MR. BARNES: Yes, but the -- as -- one moment, your
20 Honor.

21 (Pause)

22 So in American Freedom Defense Initiative the ban on
23 less controversial advertising was upheld. It wasn't all
24 controversial advertising.

25 So in the grand scheme of things, you know, there

1 are Pride flags flown all over the country. The White House
2 lights up with the colors in June. There are parades all over
3 the country. There might be some people that are upset by
4 that, but there are some people that are upset by the American
5 flag. They would sooner have, you know, the Soviet flag fly.
6 Most reasonable citizens don't find that subject matter to be
7 controversial.

8 THE COURT: The Pride flag?

9 MR. BARNES: Correct.

10 THE COURT: I think some reasonable citizens may
11 disagree, right?

12 MR. BARNES: Some might, but it's less controversial
13 than, say, a swastika.

14 THE COURT: Okay. Anything else?

15 MR. BARNES: I don't believe so, your Honor, unless
16 you have other questions for me.

17 THE COURT: I don't think I do.

18 Anything else from plaintiffs' counsel?

19 MR. RISTUCCIA: I would merely respond to the issue
20 of controversy that was just brought up by defendant.

21 THE COURT: Certainly.

22 MR. RISTUCCIA: So defendants are claiming that it
23 is reasonable for them to deny flags if those flags are
24 controversial or at least extremely controversial or like a
25 Nazi flag or apparently the Palestinian flag.

1 We think that the fact that they denied the
2 Palestinian flag is another great example of their viewpoint
3 discriminatory behavior.

4 While my particular clients by no means agree with
5 the gentleman who flew the Palestinian -- wanted to fly the
6 Palestinian flag, we believe he should have been allowed to fly
7 the flag and that that was a legitimate opinion of a citizen
8 that was viewpoint discriminated against.

9 And we have stated in our briefing from the start
10 that we've never claimed that they are only discriminating
11 against conservative voices. The city is discriminating
12 against voices on either the right or the left if they find
13 those viewpoints to be controversial or extreme, as they admit.
14 That is exactly viewpoint discrimination to say anything on
15 either of the sort of edges out. We will only take stuff
16 that's in the middle.

17 Moreover, they cite a 2018 D.C. Circuit case
18 claiming that regulations against controversy is reasonable. I
19 would note, your Honor, that that case is prior to the Supreme
20 Court's 2019 Brunetti decision which sort of redefined or at
21 least clarified what viewpoint discrimination is. So prior
22 cases before Brunetti are quite unreliable about understanding
23 what qualifies as viewpoint versus content-based
24 discrimination. This court case is not mooted and it does not
25 fit with what the recent Fikre case requires for mootness, and

1 we look forward to the Court's decision on this.

2 THE COURT: All right. Thank you.

3 Anything from any other defendants or anyone else?

4 MR. CALLAGHAN: No, your Honor.

5 MR. PIGNATELLI: No, your Honor. Thank you.

6 THE COURT: All right. Thank you.

7 All right. I'll take this motion under advisement,

8 and I'll get an order out as soon as I can.

9 Thank you. Court is adjourned.

10 (Conclusion of hearing 11:29 p.m.)

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I, Susan M. Bateman, do hereby certify that the foregoing transcript is a true and accurate transcription of the within proceedings to the best of my knowledge, skill, ability and belief.

Submitted: 12-10-24 /s/ Susan M. Bateman
SUSAN M. BATEMAN, RPR, CRR